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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 SHEPARD JOHNSON,

11 Plaintiff,

No. CIV S-10-1968 GEB GGH PS

12 vs.

13 CHESTER MITCHELL, et al.,

14 Defendants.

ORDER

15 _____/
16 Plaintiff initiated this diversity action for malicious prosecution and civil
17 conspiracy to commit malicious prosecution on July 23, 2010 and is currently proceeding with
18 the second amended complaint filed on August 24, 2011. (See Dkt. No. 80.)

19 Before the court is plaintiff's motion for leave to file a third amended complaint.
20 (Dkt. No. 111.) A hearing on this motion is currently scheduled for November 10, 2011. No
21 opposition to the motion was filed. Having reviewed the motion, the court determines that it is
22 suitable for decision without oral argument. The hearing set for November 10, 2011 is therefore
23 vacated.

24 Also before the court are letters submitted by defendants Kahler and Torniga that
25 purport to be answers and/or motions to dismiss plaintiff's second amended complaint. (Dkt.
26 Nos. 102, 113.)

1 In light of the above-mentioned filings, the Court issues the following order.

2 Motion for leave to file third amended complaint

3 Plaintiff seeks leave to file a third amended complaint, and has submitted a
4 proposed third amended complaint with his motion. Plaintiff proposes to add six additional
5 defendants, remove his demand for a jury trial, and correct certain typographical errors. (See
6 Motion for Leave to File Third Amended Complaint, Dkt. 111 [“Mot.”] ¶ 12.)

7 “After a party has amended a pleading once as a matter of course, it may only
8 amend further after obtaining leave of the court, or by consent of the adverse party.” Eminence
9 Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003). Generally, “leave shall be
10 freely given when justice so requires” and this policy is “to be applied with extreme liberality.”
11 Id. However, leave to amend is not without limits. Courts consider four factors in deciding
12 whether to permit amendment: (1) bad faith on the part of the plaintiff; (2) undue delay; (3)
13 prejudice to the opposing party; and (4) futility of the proposed amendment. Lockheed Martin
14 Corp. v. Network Solutions, Inc., 194 F.3d 980, 986 (9th Cir. 1999).

15 In his motion, plaintiff acknowledges that the court previously indicated that
16 “amendments to the complaint in this case are at an end.” (Dkt. No. 78, at p. 6.) However,
17 plaintiff explains that after he filed the second amended complaint, defendant Ford Hermanson
18 filed a purported motion to dismiss, which included an e-mail from defendant Miner to various
19 persons that were involved in filing criminal complaints against plaintiff in Panama. (Dkt. No.
20 82, at pp. 51-52.) This e-mail alerted plaintiff to the names of additional alleged conspirators,
21 which plaintiff now seeks to add as defendants. This newly discovered information is sufficient
22 to overcome the court’s reluctance to allow another amendment to the complaint. There is no
23 indication that plaintiff was acting in bad faith, with undue delay, or that the proposed
24 amendment would be futile. Moreover, there has been no meet and confer or scheduling order
25 and the parties have not engaged in discovery. No opposition to plaintiff’s motion was filed.
26 Therefore, it will be granted. That said, as plaintiff himself acknowledges, the case needs to

1 move forward, and leave to amend based on this newly discovered information should not be
2 construed as a license for further amendments.

3 Plaintiff will be required to file and serve the third amended complaint on the
4 defendants who have already been served with process within fourteen (14) days of the date of
5 service of this order. Those defendants will be required to respond to the third amended
6 complaint within 21 days of being served. However, defendants who have already answered the
7 second amended complaint (defendants Ford Hermanson, Patricia Hermanson, James Lynch,
8 David Miner, Sarah Miner, Todd Johnson, Efim Shargorodsky, Elena Shargorodsky, Chester
9 Mitchell, and Catherine Mitchell) will not be required to file another answer to the third amended
10 complaint. Unless they elect to amend their answers, their prior answers will be deemed to be
11 answers to plaintiff's third amended complaint.

12 Plaintiff will also be required to complete proper service of process with the third
13 amended complaint on defendants who have not yet been served with process, including the
14 additional defendants to be added (Smith, Cohen, Fine, Parsons, Hamond, and the Solarte Inn
15 Corporation), within 28 days of the date of service of this order. Those defendants will be
16 required to respond to the third amended complaint within 21 days of being served.¹

17 Letters submitted by defendants Kahler and Tornga

18 On September 26, 2011, defendant Julie Anne Kahler filed a "Request for Julie
19 Kahler's Dismissal from Shephard Johnson's Complaint." (Dkt. No. 102.) Also, on October 12,
20 2011, defendant Sandra Tornga filed a response to and request for dismissal of plaintiff's
21 complaint. (Dkt. No. 113.) These documents are essentially letters to the district judge outlining
22 these defendants' versions of the facts related to this case. To the extent the letters can be
23 construed as motions to dismiss, they have not been noticed for hearing nor have they been
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25 ¹ It is the court's understanding that plaintiff will dismiss the additional action filed on
26 October 5, 2011 (2:11-CV-2629-KJM-CKD) in light of plaintiff being given leave to amend his
complaint and add the additional defendants in the instant case.

1 served on plaintiff or the other parties who have appeared in this action.

2 Procedural requirements serve an important function in the orderly conduct of
3 litigation, and pro se litigants are expected to comply with procedural rules. See McNeil v.
4 United States, 508 U.S. 106, 113 (1993) (“[W]e have never suggested that procedural rules in
5 ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed
6 without counsel”). Thus, even though pleadings are liberally construed in their favor, pro se
7 litigants remain bound by the rules of procedure. King v. Atiyeh, 814 F.2d 565, 567 (9th Cir.
8 1987); Jacobsen v. Filler, 790 F.2d 1362, 1364-65 (9th Cir.1986); see also American Ass’n of
9 Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107 (9th Cir. 2000) (holding that pro se
10 litigants are not excused from knowing the most basic pleading requirements). The Local Rules
11 further provide that failure to comply with the Federal and Local Rules are grounds for judgment
12 by default and other appropriate sanctions. E.D. Cal. L.R. 183.

13 The court understands that procedural rules are complex and can be confusing.
14 Titling a document a “motion,” however, is more than a mere formality. Court personnel as well
15 as opposing counsel need certainty in characterizing, calendaring, and responding to pending
16 matters. Unnecessary judicial resources are expended when an improperly styled matter is
17 presented to the Clerk for filing pursuant to an unorthodox procedure. Neither court personnel
18 nor opposing counsel are prepared to construe or respond to filings which do not comply with the
19 federal and local rules. Letters addressed to the court do not constitute proper pleadings or
20 motions in response to a complaint. See Fed. R. Civ. P. 7. Accordingly, to the extent defendants
21 Kahler and Tornga’s letters can be construed as motions to dismiss, they are denied without
22 prejudice.

23 In the event defendants Kahler and Tornga intend to file answers to plaintiff’s
24 complaint, they must comply with the requirements of Rule 8(b), (c), and (d) of the Federal Rules
25 of Civil Procedure. Among other requirements, the answering party must “admit or deny the
26 allegations asserted against it by an opposing party.” Fed. R. Civ. P. 8(b)(1)(B). “A denial must

1 fairly respond to the substance of the allegation. A party that intends in good faith to deny all the
2 allegations of a pleading – including the jurisdictional grounds – may do so by a general denial.
3 A party that does not intend to deny all the allegations must either specifically deny designated
4 allegations or generally deny all except those specifically admitted. A party that intends in good
5 faith to deny only part of an allegation must admit the part that is true and deny the rest. A party
6 that lacks knowledge or information sufficient to form a belief about the truth of an allegation
7 must so state, and the statement has the effect of a denial.” Fed. R. Civ. P. 8(b)(2)-(5). An
8 allegation – other than one relating to the amount of damages – is admitted if a responsive
9 pleading is required and the allegation is not denied.” Fed. R. Civ. P. 8(b)(6). Furthermore, the
10 answering party must “state in short and plain terms its defenses to each claim asserted against
11 it.” Fed. R. Civ. P. 8(b)(1)(A). That includes any of the affirmative defenses listed in Fed. R.
12 Civ. P. 8(c)(1), if applicable.

13 In the event defendants Kahler and Tornga instead intend to file motions to
14 dismiss plaintiff’s complaint, they must comply with Rule 12 of the Federal Rules of Civil
15 Procedure. Such a motion must be properly served on plaintiff and the other parties who have
16 appeared in the action and noticed for hearing according to the requirements of Eastern District
17 Local Rule 230. Available hearing dates can be obtained from the undersigned’s courtroom
18 deputy clerk, Valerie Callen, at (916) 930-4199.

19 As discussed above, plaintiff will be required to serve the third amended
20 complaint on the defendants who have already been served with process, including defendants
21 Kahler and Tornga, within fourteen (14) days of the date of service of this order. Defendants
22 Kahler and Tornga will be required to file a proper response to the third amended complaint
23 within 21 days of being served with the third amended complaint.

24 Status Conference/Status Reports

25 To lend efficiency to these proceedings, the court will set a status conference in
26 this matter for January 26, 2012. The parties shall confer as soon as practicable pursuant to Fed.

1 R. Civ. P. 26(f) and file a status report(s) no later than January 12, 2012. The filing of a joint
2 status report is strongly encouraged. The parties' report(s) should briefly describe the case and
3 address:

- 4 (a) Progress in serving process;
- 5 (b) Possible joinder of additional parties;
- 6 (c) Expected or desired amendment of pleadings;
- 7 (d) Jurisdiction and venue;
- 8 (e) Anticipated motions and their scheduling;
- 9 (f) The report required by Rule 26 outlining the proposed discovery plan and its
10 scheduling, including initial disclosures and disclosure of expert witnesses;
- 11 (g) The potential for utilizing collective discovery responses in lieu of individual
12 responses in light of the number of parties involved;
- 13 (h) Cut-off dates for discovery and law and motion, and dates for the
14 pretrial conference and trial;
- 15 (i) The potential appointment of defense lead counsel;
- 16 (j) Special procedures, if any;
- 17 (k) Estimated trial time;
- 18 (l) Modification of standard pretrial procedures due to the simplicity or
19 complexity of the proceedings;
- 20 (m) Whether a case is related to any other case, including bankruptcy;
- 21 (n) Whether a settlement conference should be scheduled;
- 22 (o) Any other matters that may add to the just and expeditious disposition of
23 this matter.

24 After the status conference, the court will issue a scheduling order pursuant to
25 Fed. R. Civ. P. 16(b).

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1 Discovery

2 All discovery in this matter will be stayed until the status conference has taken
3 place.

4 CONCLUSION

5 For the foregoing reasons, IT IS HEREBY ORDERED THAT:

6 1. The November 10, 2011 hearing on plaintiff's motion for leave to file a third
7 amended complaint is vacated.

8 2. Defendants Kahler and Tornga's answers and/or motions to dismiss (dkt. nos.
9 102, 113) are denied without prejudice.

10 3. Plaintiff's motion for leave to file a third amended complaint (dkt. no. 111) is
11 granted.

12 4. Plaintiff shall file and serve the third amended complaint on the defendants
13 who have already been served with process within fourteen (14) days of the date of service of this
14 order. Those defendants, including but not limited to defendants Kahler and Tornga, shall
15 respond to the third amended complaint within 21 days of being served. However, defendants
16 who have already answered the second amended complaint (defendants Ford Hermanson,
17 Patricia Hermanson, James Lynch, David Miner, Sarah Miner, Todd Johnson, Efim
18 Shargorodsky, Elena Shargorodsky, Chester Mitchell, and Catherine Mitchell) will not be
19 required to file another answer to the third amended complaint. Unless they elect to amend their
20 answers, their prior answers will be deemed to be answers to plaintiff's third amended complaint.

21 5. Plaintiff shall complete proper service of process with the third amended
22 complaint on defendants who have not yet been served with process, including the additional
23 defendants to be added (Smith, Cohen, Fine, Parsons, Hamond, and the Solarte Inn Corporation),
24 within 28 days of the date of service of this order. Those defendants shall respond to the third
25 amended complaint within 21 days of being served.

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6. A status conference in this matter is set for January 26, 2012 at 10 a.m. The parties shall confer as soon as practicable pursuant to Fed. R. Civ. P. 26(f) and file a status report(s) in accordance with this order no later than January 12, 2012. After the status conference, the court will issue a scheduling order pursuant to Fed. R. Civ. P. 16(b).

7. All discovery in this matter is stayed until the court's status conference has taken place.

DATED: November 3, 2011

/s/ Gregory G. Hollows
UNITED STATES MAGISTRATE JUDGE

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